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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

BEVERLY HUMPHREY,

Defendant and Appellant.

B214939

(Los Angeles County
Super. Ct. No. KA084401)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Affirmed with directions.

Randall Conner, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Stephanie C. Brenan and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Beverly Humphrey was arrested and charged in a two-count information with being a felon in possession of a firearm (Pen. Code §12021, subd. (a)(1)), and with unlawful possession of ammunition (Pen. Code § 12316, subd. (b)(1)).¹ She pled not guilty and eventually admitted a prior felony conviction for importation of cocaine, for which she was serving federal probation on the date of her arrest, August 7, 2008. After trial, a jury found her guilty as charged.

Denying probation, the trial court designated count 2, unlawful possession of ammunition, as the base term, and sentenced Ms. Humphrey to state prison for the two-year middle term on that count. It also imposed the middle term of two years on count 1, to run concurrently with the sentence on count 2. The court ordered Ms. Humphrey to pay a \$20 court security fee for each count, a \$30 criminal conviction assessment fee for each count, and a \$400 restitution fine; it also imposed a \$400 parole restitution fine, which it stayed conditional upon her successful completion of parole. She was given custody credits totaling 36 days, for 24 days of actual custody and 12 days of good time/work time. Ms. Humphrey filed a timely notice of appeal the same day.

Background

In the course of a probation compliance search of Ms. Humphrey's home on August 7, 2008, officers of the Los Angeles County Sheriff's Department found a box containing twenty-three .44 caliber bullets and six .38 caliber bullets in a closed compartment in the right-hand side of the headboard of the bed in the bedroom shared by Ms. Humphrey and her husband. Underneath the bottom drawer of the bedroom dresser they found a loaded .44 caliber handgun, later determined to be registered to Ms. Humphrey's husband; on the top shelf of the bedroom closet, about six feet high, they found a 31-pound cardboard box with a leather bag containing boxes of bullets of various types, including .44 magnum and 30/30 Winchester, an empty box for .22 caliber bullets, and a ziplock bag containing some miscellaneous bullets and shotgun shells.

¹ All further statutory references are to the Penal Code.

Circumstantial evidence was consistent with the prosecution’s contention that Ms. Humphrey knowingly possessed these items, as well as with her evidence indicating she was unaware of their presence. Suffice it to say that the jury found against her. Her appeal does not challenge either the jury’s verdicts, or the sufficiency of the evidence to support them.

Ms. Humphrey’s appeal raises two issues. She contends that her possession of the handgun and the ammunition were parts of an indivisible course of conduct, for which subdivision (a) of section 654 precludes separate punishments. And she argues that the Legislature’s 2009 amendment to section 4019—effective as of January 25, 2010, while this appeal was pending—entitles her to a total of 48 days of presentence custody credits rather than the 36 days afforded by the judgment. (Stats. 2009–2010, 3rd Ex. Sess. 2009, ch. 28, § 50.) She also notes that the abstract of judgment fails to accurately reflect the trial court’s designation of count 2, not count 1, as the base term.

We agree that the abstract of judgment must be corrected to designate count 2 as the base term and count 1 as the subordinate term of appellant’s sentence, and to reflect the presentence credit required by section 4019, as amended. In all other respects, we affirm the judgment.

Discussion

1. The trial court was not required by section 654 to stay the sentence as to count 1, the subordinate term.

Appellant contends that the trial court’s imposition of concurrent sentences for counts 1 and 2 violated section 654, which precludes separate punishment for offenses that arise from a single occurrence and a single objective.² She argues that the court therefore should have stayed the sentence on count 1 (designated by the trial court as the

² Section 654, subdivision (a), as pertinent here, provides: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.”

subordinate term because the only evidence is that her possession of the handgun and ammunition were parts of an indivisible course of conduct incident to a single objective, for which separate punishment is prohibited.

In order to ensure that a defendant's punishment will be commensurate with his or her criminal liability, section 654 precludes multiple punishment for a single act or indivisible course of conduct that is punishable under more than one criminal statute. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19-20.) If the offenses for which the defendant is convicted are incident to a single objective, the court may punish the defendant for only one of them. But the defendant may be punished for each violation as to which he or she acted with more than a single intent or objective. (*People v. Perez* (1979) 23 Cal.3d 545, 551; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 267-268.) Under section 654, "the trial court retains discretion to impose punishment for the offense that it determines, under the facts of the case, constituted the defendant's 'primary objective'" keeping in mind the overall purpose of section 654. (*People v. Norrell* (1996) 13 Cal.4th 1, 6[.] The defendant's intent and objective are determined by the trial court from the evidence. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) "A trial court's implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence." (*People v. Blake* (1998) 68 Cal.App.4th 509, 512; *People v. Adams* (1982) 137 Cal.App.3d 346, 355.)

By sentencing Ms. Humphrey with respect to both counts for which she was convicted, the trial court impliedly determined that Ms. Humphrey "entertained multiple criminal objectives independent of each other" with respect to her possession of the ammunition charged in count 2 and the handgun charged in count 1.³ The issue here therefore is whether substantial evidence supports that determination. (*In re Jose P.*

³ Because concurrent sentences can violate section 654, subdivision (a), the trial court's imposition of concurrent sentences for counts 1 and 2 necessarily implies a determination that Ms. Humphrey had separate intentions or objectives in possessing the handgun and the ammunition. (*People v. Britt* (2004) 32 Cal.4th 944, 951-954; *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1564-1565.)

(2003) 106 Cal.App.4th 458, 469; *People v. Jones* (2002) 103 Cal.App.4th 1139, 1143 [trial court's determination is reviewed in light most favorable to judgment].)⁴

Ms. Humphrey argues that no evidence indicates any separate intention or objective in her possession of the firearm and the ammunition. The evidence showed, without significant contradiction, that the ammunition found in the bedroom belonged to her husband, Mr. Humphrey, although the black bag itself belonged to her ex-husband, who then lived in Oregon; that the handgun was registered to Mr. Humphrey, who had placed it under the dresser drawer; that the ammunition found in the headboard had been put there by Mr. Humphrey years earlier, when he had moved in; that Mr. Humphrey owned and had owned other firearms, of types and sizes for which the ammunition found in the bedroom could be used, which he had removed from the home when Ms. Humphrey was placed on probation; that Mr. Humphrey did not remove the ammunition from the home because he was unaware that was necessary; that Mr. Humphrey had brought the handgun back to the house shortly before the search, without Ms. Humphrey's knowledge, in order to clean it after it had been exposed to moisture; that Ms. Humphrey had serious neck and back conditions that made it painful or impossible for her to lift heavy objects or to bend over; and that Ms. Humphrey and her husband had a rocky relationship, at best, which caused her to sleep in another room or elsewhere during the months before the search, and to enter the bedroom only to get clothing when Mr. Humphrey was away at work.⁵

Appellant does not contest the jury's and the trial court's right to disbelieve the portions of that evidence that support her position, nor does she deny that the evidence is sufficient to show her constructive possession of the gun and the ammunition. But she

⁴ In determining that concurrent sentences were warranted for counts 1 and 2, the trial court expressly considered the criteria set forth in rule 4.425, California Rules of Court, concluding that neither offense aggravates the other. But the record reflects no express consideration or determination whether a stay as to count 1 was required under section 654, as rule 4.425, California Rules of Court admonishes.

⁵ There was no effort to determine whether Ms. Humphrey's fingerprints were on either the gun or the ammunition bag.

challenges the sufficiency of the evidence to establish that she had any separate intentions or objectives with respect to her unlawful possession of the handgun and the ammunition.

She notes correctly that no evidence shows her ownership, use, or direct control of either the handgun or the ammunition, and that, consistent with that state of the evidence, respondent requested and received an instruction to the jury that no more than her constructive possession of the handgun or ammunition was required in order to justify her conviction. Her unlawful possession of the firearm and ammunition could be established if she had no more than *a right to exercise control* over the handgun and ammunition, even if just through her husband. That's what respondent told the jury, arguing that "we're not talking about actual possession here, we're talking about constructive possession." "All that is required is that the defendant exercise control over, or the right to control, a thing, either directly or indirectly through another person or persons."

The evidence that is consistent with the verdicts indicates that it is Mr. Humphrey who owned the ammunition and the handgun, as well as other firearms that were compatible with the various sorts of ammunition found at the house; that until his marriage to Ms. Humphrey years earlier, he had used the ammunition and firearms for target-shooting; and that he had kept the loaded handgun at the home perhaps also with personal protection in mind. This evidence relates to Mr. Humphrey's intentions and objectives in having the ammunition and handgun in Ms. Humphrey's home, but it is equally attributable to Ms. Humphrey's constructive possession of the ammunition and handgun by virtue of her right to control her husband's possessions at that location.

Ms. Humphrey notes that the prosecution argued only a single intention or objective to the jury for the presence of both the handgun and the ammunition in the house: "[Appellant's husband] told you [the handgun] was for protection. Probably was. It probably was there for protection. And that's why the ammunition was there. The same ammunition for that gun was also in that room."

From that she argues that the imposition of separate punishments is precluded under *People v. Lopez* (2004) 119 Cal.App.4th 132, because there is no evidence of a separate intention or objective with respect to her possession of the ammunition and the

handgun. In *People v. Lopez, supra*, 119 Cal.App.4th 132, possession of a handgun and the ammunition loaded in it was held to be an indivisible act, for which separate punishment is prohibited by section 654. (*Id.* at pp. 138-139.)

But in this case, unlike in *People v. Lopez*, appellant was found to be in possession of not just a handgun and the ammunition loaded in it, but also additional ammunition that was not even usable in the handgun. From this we are compelled to conclude that Ms. Humphrey's unlawful possession of that additional ammunition was not necessarily done with the same intent and objective as her possession of the loaded handgun. The presence of ammunition that cannot be used in the handgun eliminates the inference that the incompatible ammunition was intended to be used for the same purpose as the handgun. While on this evidence the trial court could have concluded that Ms. Humphrey's unlawful possession of the ammunition and handgun was not for protection (but was, for example, simply to avoid confronting her husband about it), that determination is not compelled by the evidence. "Whether a course of criminal conduct violating more than one penal statute is committed with a single criminal intent or with multiple criminal objectives is ordinarily a question of fact for the trial court, whose implied finding of multiple criminal intent will be upheld if supported by substantial evidence." (*People v. Green* (1988) 200 Cal.App.3d 538, 543-544.)

Whatever Ms. Humphrey's intentions and objectives might have been in unlawfully possessing the handgun and that incompatible ammunition, the trial court therefore was justified by the evidence in concluding that they were not the same. The trial court therefore acted within its discretion by imposing sentence on both count 1 and count 2.

2. Appellant is entitled to increased credits under section 4019, as amended.

On March 19, 2009, the trial court sentenced appellant to state prison, awarding her 12 work and conduct credits based on her 24 days in actual custody, for a total of 36 days of presentence credit. That comported with the provisions of section 4019 that were

then in effect, under which a defendant was deemed to have served six days for every four days actually in custody. (*People v. Fry* (1993) 19 Cal.App.4th 1334, 1341.)⁶

In October, 2009, however, during this appeal from the judgment, the Legislature amended section 4019, effective as of January 25, 2010, to provide that for defendants such as appellant, “a term of four days will be deemed to have been served for every two days spent in actual custody” (§ 4019, subd. (f).) The issue before us therefore is whether the amended provisions of section 4019 apply to a judgment—such as the judgment in this case—that was not yet final on the date the amendment became effective.⁷ The question whether a statute applies retroactively is a question of law, subject to independent review. (*In re Chavez* (2004) 114 Cal.App.4th 989, 994.)

We do not write on a clean slate as to this issue. In *People v. House* (2010) 183 Cal.App.4th 1049 this division held that the amended custody credits of section 4019 apply retroactively to judgments that were not yet final when section 4019 became effective. Division Six of this District reached the same conclusion in *People v. Delgado* (2010) 184 Cal.App.4th 271, as did the Third District in *People v. Brown* (2010) 182 Cal.App.4th 1354, and Divisions Two and Five of the First District in *People v. Landon* (2010) 183 Cal.App.4th 1096, and *People v. Pelayo* (2010) 184 Cal.App.4th 481.⁸

⁶ Under the then-applicable formula of section 4019, “[t]he correct amount of credit [was] calculated by dividing the number of days spent in custody by four and rounding down to the nearest whole number. This number is then multiplied by two and the total added to the original number of days spent in custody.” (*People v. Fry, supra*, 19 Cal.App.4th at p. 1341.) Thus Ms. Humphrey’s 24 days of actual custody, divided by four equals 6 (a whole number); 6 multiplied by 2 equals 12; added to 24 equals 36 credits.

⁷ Respondent does not dispute that the judgment in this case is not yet final for this purpose. (See *People v. Vieira* (2005) 35 Cal.4th 264, 306 [“for the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petition for a writ of certiorari in the United States Supreme Court has passed”].)

⁸ The Fifth District has reached the opposite conclusion on the issue. (*People v. Rodriquez* (2010) 183 Cal.App.4th 1, 4-24), as has Division Two of the Fourth District; see also *People v. Otubuah* (Apr. 7, 2010, E047271) __ Cal.App.4th __ [2010 Cal.App.

As we explained in *People v. House, supra*:

- It is well established that unless an application that is wholly prospective is required by statute, “a defendant is entitled to the benefit of a more recent statute which mitigates the punishment for the offense” (*People v. House, supra*, 183 Cal.App.4th at p. 1055.)
- This rule applies to any criminal proceeding that has not reached final disposition at the time the statute has been amended, so that the lighter punishment under the statutory revision will be imposed whenever the judgment is not yet final when the amendment became effective. (*People v. House, supra*, 183 Cal.App.4th at p. 1055.)
- No statutory provision requires that the revision to section 4019 must be applied only prospectively, and retroactive application of the revised provision is consistent with the amendment’s expressed legislative purpose; therefore “the amendment to Penal Code section 4019 applies retroactively and . . . Appellant is entitled to the benefit of the amendment.” (*People v. House, supra*, 183 Cal.App.4th at p. 1057.)

Consistent with our decision in *People v. House, supra*, the judgment is reversed as to calculation of presentence custody credits.

Disposition

The case is remanded to the superior court for resentencing, with directions to correct the abstract of judgment to reflect the court’s designation of count 2 as the base term, to recalculate the presentence credit to conform to section 4019, as amended, and to

Lexis 622] [Court of Appeal, Fourth District Division Two, declines to find retroactivity with respect to similar statutory revision].)

forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.